FILE COPY

Office - Supreme Court, U. S
FILED
AUG 16 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 319

ROBERT K. MOOKINI and LEE SAU CHONG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

O. P. SOARES,
1-2 Union Trust Bldg.,
Honolulu, Hawaii,
Counsel for Petitioners.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO

Subject Index

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Reasons Relied on for Allowance of Writ	3
Brief in Support of Petition for Writ of Certiorari	5
Opinions of Courts Below	6
Jurisdiction	6
Statement of the Case	6
Specification of Errors	7
Argument	10
Summary of Argument	10
Point 1	11
Point 2	13
Point 3	19
Point 4	19
Conclusion of Argument	20

Table of Authorities Cited

	Pages
Arkansas v. Kansas & T. Coal Co., 183 U. S. 185; 46 L. Ed. 144, 147	18
Bridgeman v. U. S., 140 Fed. 577; 72 C. C. A. 145	15
Brown v. Piper, 91 U. S., 28 L. Ed. 200	18
Dodge v. U. S., 258 Fed. 300	19
Fillipon v. Albion Vein State Co., 250 U. S. 76	19
Little v. U. S., 73 Fed.(2d) 861	20
Mrs. Ah Fook Chang et al. v. U. S., ... F.(2d) ... (C. C. A. 9), decided July 26, 1937	19
Outlaw v. U. S., 81 F.(2d) 805	19
Peppers v. United States, 32 F.(2d) 346	19
Philadelphia & R. Ry. Co. v. Skerman, 247 Fed. 269	19
Ponzi v. Fessenden, 258 U. S. 254, 260	19
Sandusky Cement Co. v. A. R. Hamilton & Co., 287 Fed. 609	19
Shields v. U. S., 273 U. S. 583, 588	19
U. S. v. Christopherson et al., 261 Fed. 226	13
U. S. v. Franklin, 174 Fed. 161	15
U. S. v. Greene, 115 Fed. 343	15
U. S. v. Reichert (C. C.) 32 Fed. 142	15
U. S. v. Stubbs, 6 Alaska 736	16
U. S. v. Tingey, 5 Pet. 115; 8 L. Ed. 66	17
U. S. v. Wallace, 40 Fed. 144	15

Table of Statutes Cited

Criminal Code, sec. 35	2
Judicial Code, sec. 240	6
31 Stat. at L. 141, c. 339	13
47 Stat. 904	11
48 Stat. 399 (23 U. S. C. A., sec. 723a)	12
18 U. S. C. A., sec. 80	2, 6
28 U. S. C. A., sec. 641	2
28 U. S. C. A., chapter 5	2
48 U. S. C. A., secs. 641 and 642	10
48 U. S. C. A., sec. 643	13
U. S. Code (sec. 35, C. C.)	6

In the Supreme Court of the United States

OCTOBER TERM, 1937

No.....

ROBERT K. MOOKINI and LEE SAU CHONG,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States Circuit Court of Appeals for the Ninth Circuit dismissed petitioner's appeal, holding

that Rules of Practise and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in the District Courts of the United States and in the Supreme Court of the District of Columbia and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States, promulgated by this Court May 7, 1934, and specifically Rule III. thereof, are applicable to the district court in the Territory of Hawaii and that therefore, the appeal was not taken in time. The appeal being thus summarily dismissed, the case was not reviewed.

The pertinent facts of the case are that petitioners were jointly indicted on two counts of violating section 35 of the Criminal Code (18 U. S. C. A., sec. 80) and were tried in the court provision for which is made in the Organic Act of the Territory of Hawaii (28 U. S. C. A., sec. 641) therein denominated " a district court," which court is not to be confused with District Courts of the United States, the latter being provided for by Chapter 2, Title 28 of the United States Code, and the judicial districts in which District Courts of the United States are established being set out in Chapter 5, Title 28, of the United States Code.

A jury found petitioner Mookini guilty on one count of the indictment and not guilty on the other, and the petitioner Lee Sau Chong guilty on both counts.

Admittedly, if the rules of this Court promulgated May 7, 1934 are limited to the District Courts of the United States and the other Courts therein enumerated and do not extend to the United States Court in the Territory of Hawaii, the appeal should not have been dismissed.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In this case, the United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law, which has not been, but should be, settled by the Supreme Court of the United States.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket No. 8183, Robert K. Mookini and Lee Sau Chong, appellants, v. United States of America, appellee, to the end that the cause may be reviewed and determined by this Court and that the judgment herein of said Court be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated at Honolulu, Hawaii, August 10, 1937.

O. P. SOARES,
Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1937.

No.....

ROBERT K. MOOKINI and LEE SAU CHONG,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit at the moment of writing this Brief has not been reported but is to be found on page 1016 of the record.

The case in the trial court was unreported.

II.

JURISDICTION.

It is believed and urged that the jurisdiction of this Court is sustained by Judicial Code, section 240 as amended (28 U. S. C. A., sec. 347).

III.

STATEMENT OF THE CASE.

Robert K. Mookini and Lee Sau Chong, appellants herein, together with William E. Miles and John E. Cunningham were jointly indicted by a grand jury on March 19, 1935, for violations of Section 80, Title 18, United States Code (section 35, C. C.), the indictment being in two counts.

COUNT I, charges all four defendants with making and causing to be presented to the camp director of the Civilian Conservation Corps, Schofield Camp, Hawaii, a fraudulent claim and voucher, on which appeared certain items of shell fish, fruit, and vegetables which were not delivered but for which payment was claimed. The evidence shows, however, that payment was never in fact made.

COUNT II, relates to a date and to items different from those set out in Count I (R. pp. 5, 11).

Defendant Mookini filed a demurrer on twenty-six grounds (R. p. 12) and defendant Lee Sau Chong filed a demurrer on nineteen grounds (R. p. 20).

Both demurrers were overruled. Defendant Lee Sau Chong filed a motion for severance (R. p. 35) which motion was overruled.

The case proceeded to trial. In due course Mookini was found guilty on the first count and not guilty on the second count and Lee Sau Chong was found guilty on both counts.

Thereafter, an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and after briefs filed and oral argument, that court dismissed the appeal on the ground that the same had not been taken in accordance with certain rules promulgated by this Court on May 7, 1934.

IV.

SPECIFICATION OF ERRORS.

1. The said Circuit Court of Appeals erred in holding that the Rules of Practise and Procedure after plea of guilty, verdict of guilt by a jury, or finding of guilt by the trial court where a jury is waived, in criminal cases in the District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States promulated by this Court May 7, 1934, and specifically Rule III, of those rules are applicable to

the district court in the Territory of Hawaii (R. p. 1016).

2. The trial court erred in overruling the demurrers to the indictment, particularly grounds 5, 12, 13, 14 and 17 thereof (R. pp. 143, 144, and 145) which read as follows:

> "5. That it does not appear from the allegations of said count that the Camp Director to whom it is alleged that said claim was presented for approval and payment was authorized by law to make payment or to approve the making of payment (R. p. 143).
>
> "12. That said count of said indictment is indefinite and uncertain in that it fails to show how or in what manner said bill was fraudulent or fictitious and it fails to appear whether it is charged that the items therein set forth were so set forth as inaccurate or incorrect records of charges which might or could properly be made, or as records of charges which could not be made at all, it failing to appear therefrom whether or not any other goods or merchandise of a like value was delivered and billed as in said indictment set forth. (R. p. 144).
>
> "13. That said count of said indictment while charging that said goods were not delivered to the Civilian Conservation Camp at all, fails wholly and completely to show that any fraud was thereby perpetrated or that said bill was not a proper bill for presentment in that it fails to appear from said count that said goods were not delivered to some other proper and suitable place for delivery. (R. p. 145.)

"14. That it does not appear from the allegations of said count that this defendant was bound to deliver said goods to the Civilian Conservation Camp in order to become entitled to receive payment therefor, it affirmatively appearing that delivery at any suitable place to any person authorized to accept delivery on behalf of the United States Government would be proper delivery, said count failing to indicate that such proper delivery was not made.

"15. That the allegations of said count fail to state facts showing the commission of a crime by this defendant.

"16. That the allegations of said count fail to show violation of the provisions of Section 80, Title 18, United States Code. (Section 35, C. C.)

"17. That said count of said indictment fails completely to state facts from which this defendant can possibly know the exact nature of the crime charged against him or can possibly prepare for trial in defense thereof."

3. The trial court erred in overruling the motion of defendant Lee Sau Chong that his cause as a defendant in said action be severed for the purpose of trial from the causes of the other defendants (R. p. 117).

4. The trial court erred in giving information to, and communicating with, the jury as to facts or evidence relating to said cause while said jury was deliberating on its verdict in said cause, such information being given and communication had while the defendants Robert K. Mookini and Lee Sau Chong

were not personally present and in the absence of their counsel and without notice to them and outside of the court room.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT 1. The Rules of Practise and Procedure after conviction in criminal cases promulgated by this Court are applicable to District Courts of the United States only and not to the district court established in the Territory of Hawaii by sections 641 and 642 of Title 48, U. S. C. A.

There is a marked and clearly drawn distinction between District Courts of the United States and the district court established in the Territory of Hawaii by Sections 641 and 642 of Title 48, U. S. C. A.

In promulgating the aforesaid Rules of Practise and Procedure, this Court intended that they should not apply to the district court established in the Territory of Hawaii by Sections 641 and 642 of Title 48, U. S. C. A.

POINT 2. The indictment upon which defendants were forced to go to trial did not set out all the material facts and circumstances embraced in the definition of the offense sought to be charged; it omitted material language of the statute nor did it supply the lack with other language.

POINT 3. The trial court having granted the defendant Miles a separate trial should have severed the causes as against Mookini and Lee Sau Chong. By refusing to do so, the court made it appear to the jury that Mookini and Lee Sau Chong must have been acting together.

POINT 4. The communication with the jury by the trial judge while the jury was deliberating on its verdict consisted of a statement made by him based on his recollection of the evidence although there was documentary evidence on the subject; was not warranted by the evidence; was in the absence of the defendants and their respective counsel; and was not in the court room.

POINT 1.

It is clear from the language employed therein, that the Rules of Practise and Procedure after conviction in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, promulgated by this court on May 7, 1934 are limited to criminal cases in the District Courts of the United States and in the Supreme Court of the District of Columbia and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

The Congress of the United States by the Act of February 24, 1933, C. 119, 47 Stat. 904 as amended by

the Act of March 8, 1934, C. 49, 48, Stat. 399 (23 U. S. C. A., sec. 723a) gave this Court power to prescribe rules of this nature in criminal cases in district courts of the United States and of Alaska and of Hawaii and of Puerto Rico and of the Canal Zone and of the Virgin Islands, as also in the Supreme Courts of the District of Columbia and of Hawaii and of Puerto Rico, and in the United States Court for China, and in all United States Courts of Appeals and in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

In promulgating these rules this Court limited them to the District Courts of the United States, the Supreme Court of the District of Columbia, the United States Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States; and has thus far promulgated no new rules for criminal cases in the district courts of Alaska, of Hawaii, of Puerto Rico, of Canal Zone, or of the Virgin Islands; the Supreme Courts of Hawaii and of Puerto Rico; and the United States Court for China.

The Territory of Hawaii has never been marked off into judicial districts or into one judicial district.

The Judicial Code of the United States provides no district court for the Territory of Hawaii.

As originally created, the United States court for Hawaii, like the United States court for China had a greater jurisdiction than District Courts of the United States. The court in which the trial of this

case was had was brought into existence by the Act of April 30, 1900, 31 Stats, at L. 141, c. 339. The provision for jurisdiction of this court was made in this language: "Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States and shall proceed therein in the same manner as a circuit court and said judge * * * shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges * * * of district and circuit courts of the United States" (sec. 86).

The court in which this case originated and was tried can hardly be said to be a District Court of the United States when, as is the case, only persons who are "citizens of the Territory of Hawaii and have resided therein for three years next preceding their appointment" are eligible for appointment to that bench (48 U. S. C. A., sec. 643).

POINT 2.

In the case of *U. S. v. Christopherson et al.*, 261 Fed. 226, defendants were indicted on five counts under the same statute as that under consideration on the appeal. The defendants therein demurred to the indictment, which read as follows:

> "That on or about the 31st day of December, 1917, one Louis Christopherson and Charles J. Bauer, who were then and at all times hereinafter mentioned the president and secretary respectively of the St. Louis Coffee & Spice Mills,

a corporation duly organized and existing under the laws of the state of Missouri, with its chief office and place of business in the city of St. Louis, Missouri, and in the division and district aforesaid, and within the jurisdiction of the court aforesaid, did unlawfully, knowingly, wilfully, and feloniously make and present, and cause to be made and presented, for approval and payment to one Capt. A. R. Piper, who was then and there an officer in the military service of the United States, a certain false claim and public voucher upon and against the Quartermaster Department of the United States Army."

The Federal court, in sustaining the demurrer, said:

"The second point of objection urged by the defendants against the indictment herein applies to each of the five counts contained in the indictment. The objection is bottomed upon the fact that the indictment does not aver that the alleged voucher was presented to any officer of the United States clothed with authority to examine and approve such voucher for payment, nor does either of the five counts thereof allege anything touching such authority. It will be noted that the only charge made therein opposite to this point is that the alleged false voucher was presented for approval and payment to one Capt. A. R. Piper who was then and there an officer in the military service of the United States.

"It will be observed that nothing whatever is averred in the indictment as to the authority of Capt. Piper to approve and pay, or approve for

payment, the voucher in question; nor does such indictment set out the arm or branch of the service to which Capt. Piper belonged, so that judicial notice might eke out this omission. While the language of the statute merely makes it an offense to present a false voucher to any civil, military, or naval officer, yet obviously by this language is meant that the officer to whom such voucher shall be presented must be a civil, military, or naval officer, clothed with power to approve and pay the same. Otherwise the mere presentation of a false voucher to any officer of the United States, military, naval or civil, would be a crime, whether such officer had authority to act in the premises or not. Such condition is unthinkable. I am of opinion that the ruled cases require that an apt allegation of such authority ought to be made in each of the five counts of the indictment. *Bridgman v. U. S.*, 140 Fed. 577, 72 C. C. A. 145; *U. S. v. Reichert*, (C. C) 32 Fed. 142; *U. S. v. Franklin*, (C. C.) 174 Fed. 161; *U. S. v. Wallace*, (D. C.) 40 Fed. 14; *U. S. v. Greene*, (D. C.) 115 Fed. 343.

"While some of these cases were not prosecutions under either section 35 or 37 of the Penal Code, yet what is said in them obviously is opposite to the condition presented in the instant case. I therefore hold that an apt allegation that the officer, to whom the voucher in question was presented, was vested with authority to approve for payment, or to pay such voucher, was necessary, and that lacking such allegation the indictment as to each of the five counts thereof, is in this behalf, defective."

In an earlier case (*U. S. v. Reichert,* supra) the Federal court again sustained a demurrer to the indictment under the identical statute for the similar reason that the indictment was fatally defective in not alleging that the officer to whom the false claim was presented had authority to approve and allow such claim.

The appellate court in sustaining the demurrer to the indictment said on page 143:

> "But I agree with the circuit judge that the absence of any averment of authority in the surveyor general to allow and approve the claim which was presented to him, is, of itself, a fatal defect."

In *U. S. v. Wallace,* supra, the defendant was indicted under the identical statute. The indictment charged that defendant did present for payment to George I. Cunningham, he being an officer in the civil service of the United States, that is, being United States Marshall in and for the district of South Carolina, a claim against the government of the United States. The court sustained the demurrer to the indictment on the ground that it was not shown that Cunningham had authority to approve and pay such claim.

In the case of *U. S. v. Stubbs,* 6 Alaska 736, the defendant was on trial for presenting a false and fictitious claim to the United States. On motion for a directed verdict, the indictment was held insufficient because of a total omission of any allegation or state-

ment which charged that this alleged false claim was a claim against the government of the United States.

It does not so much as appear from the indictment that the "Camp Director" referred to therein was an officer of the United States or that he was clothed with power to approve and pay the claim and voucher described or any claim or voucher.

The designation "director" is nowhere used in the statutes, executive orders, or departmental regulations promulgated by authority of law to indicate "an officer of the United States" attached to the Schofield Camp of the Civilian Conservation Corps "clothed with power to approve and pay" the claim and voucher described in the indictment.

The rule long ago enunciated by the Supreme Court of the United States in *U. S. v. Tingey,* 5 Pet. 115, 8 L. Ed. 66, is still the law.

> "There is no statute of the United States expressly defining the duties of pursers in the navy. What those duties are, except so far as they are incidentally disclosed in public laws, *cannot be judicially known by this Court.* If they are regulated by the usage and customs of the Navy, or by the officials orders of the Navy Department, they properly constitute matters of averment, and *should be spread upon the pleading.*"

And even were there such an officer as camp director "clothed with power to approve and pay" claims and vouchers on behalf of the United States, the trial Court could not supply the deficiency in the

indictment by the application of the rule which permits the taking of judicial notice of certain facts.

In *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185, 46 L. Ed. 144, it is said at page 147:

> "And as to judicial knowledge, the principle applies that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them."

In *Brown v. Piper*, 91 U. S., 28 L. Ed. 200 at 202 the rule is stated thus:

> "This power of judicial notice is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

It nowhere appears, in statute, in executive order, or in departmental regulation promulgated by authority of law, that a camp director is a "civil, military, or naval officer clothed with power to approve and pay claims and vouchers," hence it follows the deficiency in the indictment cannot be supplied.

This deficiency is a matter of substance and not of form affecting as it does the right of defendants not to be placed on trial except after indictment clearly showing that they are charged with a violation of a statute in the words of the statute or their equivalent.

POINT 3.

It is respectfully submitted that it was an abuse of discretion to sever the case as to Miles and Cunningham and requiring Mookini and Lee Sau Chong to stand trial together, thus making it appear that these two defendants were acting jointly. In other words, to properly safeguard appellant's right to a fair trial, each of the four defendants should have been tried separately or all four should have been tried together.

POINT 4.

Ponzi v. Fessenden, 258 U. S. 254, 260; and *Shields v. United States,* 273 U. S. 583, 588, are authority for the proposition of law that appellants were entitled to be personally present at every stage of the trial.

Fillipon v. Albion Vein Slate Co., 250 U. S. 76; *Shields v. United States,* 273 U. S. 583; *Philadelphia R. Ry. Co. v. Skerman,* (C. C. A. 2) 247 Fed. 269; *Dodge v. United States,* (C. C. A. 2) 258 Fed. 300; *Outlaw v. United States,* (C. C. A. 5) 81 F.(2d) 805; *Sandusky Cement Co. v. A. R. Hamilton & Co.,* (C. C. A. 6) 287 Fed. 609; *Peppers v. United States,* (C. C. A. 6) 37 F.(2d) 346; *Little v. United States,* (C. C. A. 10), 73 F.(2d) 861; are authority for the proposition of law that it is error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them.

Though the record may not disclose whether error committed in the trial of a criminal case is prejudicial or is not prejudicial, error having been shown, it is

presumed to be prejudicial and to require reversal (*Little v. United States,* (C. C. A. 10) supra; *Mrs. Ah Fook Chang et al v. United States,*.....F.(2d)..... (C. C. A. 9), decided July 26, 1937).

CONCLUSION.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decisions.

Dated at Honolulu, Hawaii, this 10th day of August, 1937.

O. P. SOARES,
Counsel for Petitioners.